IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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| ALBERT L. GRAY, ADMINISTRATOR, et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>JEFFREY DERDERIAN, et al.,<br><br>Defendants. | Case No. 04-CV-312 |

**RULE 12(B)(6) MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED MASTER COMPLAINT BY LEGGETT & PLATT, INCORPORATED AND L&P FINANCIAL SERVICES CO.**

In accordance with the Court's December 17, 2004 Order and the Court's instructions given at the hearing on Plaintiffs' Motion to Amend on December 16, 2004, Leggett & Platt, Incorporated and L&P Financial Services Co. (collectively "L&P") hereby move the Court to dismiss the claims made against L&P in Plaintiffs' First Amended Master Complaint pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiffs' allegations, which may be accepted as true solely for purposes of this motion, establish L&P is entitled to dismissal.

L&P incorporates herein by reference its previously filed Motion to Dismiss the Master Complaint, the accompanying Memorandum in Support of its Motion to Dismiss the Master Complaint, and its Reply Memorandum in Support of its Motion to Dismiss the Master Complaint. L&P submits herewith a Supplemental Memorandum in Support of its Motion to Dismiss the First Amended Master Complaint.



264

WHEREFORE, for the foregoing reasons and for those reasons set forth in the accompanying and incorporated filings, Leggett & Platt, Incorporated and L&P Financial Services Co. respectfully request this Court grant their Motion to Dismiss and dismiss with prejudice all claims made against them in Plaintiffs' First Amended Master Complaint and for such further relief as this Court deems just and proper.

DEFENDANTS
LEGGETT & PLATT INCORPORATED and
L&P FINANCIAL SERVICES CO.
By their attorneys,

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**CERTIFICATION**

I hereby certify that on this 6th day of January, 2005, a copy of the within was sent to all counsel of record by email.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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| ALBERT L. GRAY, ADMINISTRATOR, et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>JEFFREY DERDERIAN, et al.,<br><br>Defendants. | Case No. 04-CV-312 |

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF RULE 12(B)(6) MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED MASTER COMPLAINT BY LEGGETT & PLATT, INCORPORATED AND L&P FINANCIAL SERVICES CO.**

Plaintiffs recently filed a First Amended Master Complaint ("Amended Complaint"). In response, and in accordance with the Court's December 17, 2004 Order and the Court's instructions given at the hearing on Plaintiffs' Motion to Amend on December 16, 2004, Defendants Leggett & Platt, Incorporated and L&P Financial Services Co. (collectively "L&P") submit this Supplemental Memorandum in Support of their Rule 12(b)(6) Motion to Dismiss Plaintiffs' Amended Complaint and incorporate herein by reference L&P's previously filed Motion to Dismiss the Master Complaint, the accompanying Memorandum in Support of its Motion, and L&P's Reply Memorandum.[1]

[1] Although L&P's counsel received copies by regular mail of a Notice of Adoption of First Amended Master Complaint in *Kingsley, et al. v. Derderian, et al.* (C.A. No. 03-208L), *Passa, et al. v. Derderian, et al.* (C.A. No. 03-148L), and *Henault, et al. v. American Foam Corp., et al.* (C.A. No. 03-483L), as well as a Pro Forma Complaint (adopting the First Amended Master Complaint) in *Paskowski, et al. v. Derderian, et al.* (no C.A. No. referenced), L&P has never been served with process in these cases.

## INTRODUCTION

Plaintiffs' Amended Complaint is nothing more than an attempt to somehow shield their allegations of acts which constitute intervening cause from scrutiny and, thereby, avoid dismissal through crafty pleading. The only actual difference, however, is that the counts against L&P no longer expressly incorporate the multiple intervening acts that occurred between L&P's manufacture of bulk polyurethane foam and Plaintiffs' injuries. Plaintiffs' attempt to cast the factual allegations made in counts against other defendants as "alternative claims," which cannot be used as admissions against them in evaluating the validity of their claims against L&P, must be rejected. Even a cursory reading of the Amended Complaint reveals all factual allegations are not made "in the alternative," but instead, are entirely consistent with one another and are made serially and in tandem.

Plaintiffs' Amended Complaint also adds a warranty claim against L&P. This addition, however, does not affect L&P's right to dismissal as all the reasons supporting dismissal are applicable to Plaintiffs' warranty claim. Finally, Plaintiffs' Amended Complaint includes some new allegations. Such new allegations, however, merely purport to state as "facts" the legal conclusions Plaintiffs argued in response to L&P's original Motion to Dismiss.

None of these changes or additions alter the fact that L&P is entitled to dismissal of all counts against it on the grounds that the pleadings themselves establish L&P owed no duty to Plaintiffs and L&P's manufacture of bulk polyurethane foam was not the proximate cause of Plaintiffs' alleged injuries.

## ARGUMENT

### I. Plaintiffs' Factual Allegations Are Not Plead "In The Alternative" And Constitute Binding Admissions Of Intervening Acts, Which Preclude A Finding Of Proximate Cause Against L&P.

Plaintiffs have argued the myriad intervening acts that occurred between L&P's remote manufacture of bulk polyurethane foam and the alleged injuries were foreseeable to L&P. Plaintiffs now appear to argue that, in addition to being foreseeable, the intervening acts set forth in the Master Complaint, and reiterated in the Amended Complaint, are somehow inconsistent with, or plead "in the alternative" to, the allegations against L&P. Plaintiffs' arguments are without merit.

Realizing the allegations of the Amended Complaint pose a serious threat of dismissal, Plaintiffs attempt to invoke Fed. R. Civ. P. 8(e)(2) alternative pleading to avoid the inescapable consequences of their own allegations of intervening acts. Plaintiffs' assertion that, under the alternative pleading rules, their claims against any defendant other than L&P are not judicial admissions of the intervening acts of others fails because such claims are not truly made "in the alternative" at all.

An alternative claim typically takes the form of an "either-or" allegation and, thereby, permits the pleading of ***inconsistent facts***. See, e.g., Schott Motorcycle Supply, Inc. v. American Honda Motor Co., Inc., 976 F.2d 58, 62 (1st Cir. 1992); Holman v. Indiana, 211 F.3d 399 (7th Cir. 2000). For example, in Holman, a husband and wife each asserted a claim of sexual harassment against their common supervisor. Facing dismissal under Rule 12(b)(6) – because their pleadings established that the supervisor was an "equal opportunity harasser" and, therefore, had not discriminated against either of them on the basis of sex – the two contended

that their claims were made in the alternative, *i.e.* that the supervisor had harassed one or the other of them, but not both. The court rejected their argument, stating:

> While the Holmans need not use particular words to plead in the alternative, they must use a formulation from which it can be reasonably inferred that this is what they were doing. The "liberal construction accorded a pleading under Rule 8(f) does not require the courts to fabricate a claim that a plaintiff has not spelled out in his pleadings." And while we must draw *reasonable* inferences in the Holmans' favor, we should not draw inferences that while theoretically plausible are inconsistent with the pleadings. Here, the Holmans did not attempt to plead in the alternative; they clearly pleaded in tandem.

Holman, 211 F.3d at 407 (internal citations omitted) (emphasis in the original).

While Rule 8 does allow pleading in the alternative, factual allegations that are in no way inconsistent with other factual allegations are ***not*** plead in the alternative and constitute judicial admissions. Royal Consulting, Inc. v. Agri-Mark, 1990 WL 83445, *3 (S.D.N.Y. June 13, 1990) (noting that pleading in the alternative was allowed under the federal rules, but recognizing that "factual statements made in the pleadings and not contradicted in alternative pleadings remain admissions."). If this were not true, any plaintiff could avoid the inescapable consequences of pleading facts that, otherwise, would entitled a defendant to dismissal by simply labeling such allegations "in the alternative." Such is not the purpose or the effect of Rule 8.

None of Plaintiffs' claims against the various defendants are set forth in the form of "either-or" allegations. Nor are any of Plaintiffs' theories of recovery against L&P, including the factual allegations supporting such theories, in any way inconsistent with the other facts alleged. Instead, even a cursory review of Plaintiffs' allegations reveals the Amended Complaint sets forth several ***entirely consistent*** theories of recovery against multiple defendants. As in Holman, Plaintiffs have pleaded their claims against the various defendants in tandem, not in the alternative. Indeed, Plaintiffs allege a consistent series of facts purportedly creating liability for

multiple defendants. The individual facts within this series are not only consistent with one another, but are necessary prerequisites to Plaintiffs' claims. For example, the intervening acts alleged by Plaintiffs are, quite simply, necessary to the liability Plaintiffs seek to impose on L&P. Plaintiffs' attempt to compartmentalize portions of this series of events in order to avoid their consequences must fail as none are plead "in the alternative" within the meaning of Rule 8.

The mere fact Plaintiffs have now chosen not to incorporate their factual allegations against other defendants into their counts against L&P does not alter the consistent and serial nature of these allegations. Indeed, Plaintiffs' allegations of intervening acts are ***necessarily*** incorporated as they form the required underpinnings of Plaintiffs' allegation that these ***very same acts*** were foreseeable to L&P. In paragraphs 520 through 523 and 548 through 551, Plaintiffs allege the very acts they now seek to sever from the claims against L&P were foreseeable to L&P. Plaintiffs explicitly acknowledge and rely upon the intervening acts within the boundaries of the claims against L&P. In order to allege such intervening acts were foreseeable to L&P, Plaintiffs necessarily must plead the factual prerequisite – that the intervening acts occurred. Plaintiffs cannot simultaneously pretend such intervening acts cannot be considered as part of the well-pleaded factual allegations against L&P for purposes of rule 12(b)(6) analysis.

As discussed fully in L&P's original Motion to Dismiss, the intervening acts alleged by Plaintiffs require dismissal of all claims asserted against L&P in the Amended Complaint as proximate causation, a necessary element of Plaintiffs' claims, cannot be shown.

## II. Plaintiffs' Breach Of Warranty Claim Should Be Dismissed.

Plaintiffs' Amended Complaint includes a new warranty claim alleging L&P breached express and implied warranties of merchantability and fitness. Amended Complaint, ¶¶ 534, 535, 562, 563. This new claim, however, is merely redundant and does not affect L&P's right to dismissal. Rhode Island law is clear - breach of express and implied warranty claims against a product manufacturer ***require*** proof that a defect attributable to the manufacturer proximately caused the alleged injury. Simmons v. Lincoln Elec. Co., 696 A.2d 273, 274-75 (R.I. 1997). See also Scittarelli v. Providence Gas Co., 415 A.2d 1040, 1046 (R.I. 1980) (recognizing same with respect to defect). The Rhode Island Supreme Court has also held the product liability defenses set forth in the Restatement (Second) of Torts are equally available in the context of breach of warranty claims arising from an alleged product defect. Castrignano v. E.R. Squibb & Sons, Inc., 546 A.2d 775, 783 (R.I. 1988).

As such, Plaintiffs' inclusion of a warranty claim does not alter the analysis. Each and every reason why L&P is entitled to dismissal, as set forth in the filings in support of its Motion to Dismiss, is equally applicable to Plaintiffs' warranty claim. L&P is entitled to dismissal.

## III. The Other Allegations Added To The Amended Complaint Provide Plaintiffs No Basis For Recovery.

With the exception of the breach of warranty claim addressed above, the Amended Complaint adds no new claims against L&P. As Plaintiffs admitted in their memorandum in support of their motion to amend, they added only ". . . factual detail to the foam defendants' counts." This supposed new "factual detail" is set forth primarily in the strict liability counts. Rather than providing true factual detail, however, these new allegations merely

restate the bald assertions and legal conclusions set forth in Plaintiffs' opposition to L&P's original Motion to Dismiss. Such are not well-pleaded factual allegations and should not be considered by the Court. See Glassman v. Computervision Corporation, 90 F.3d 617, 628, (1st Cir. 1996) (recognizing that in deciding a motion to dismiss under Rule 12(b)(6), the court must take only all well-pleaded facts as true, but "need not credit a complaint's 'bald assertions' or 'legal conclusions'") (citation omitted); Washington Legal Foundation v. Massachusetts Bar Foundation, 993 F.2d 962, 971 (1st Cir. 1993) (stating "Because only well-pleaded facts are taken as true, we will not accept a complainant's unsupported conclusions or interpretations of law.").

The so-called "factual detail" set forth in the various strict liability counts against L&P amounts to nothing more than bald assertions that add nothing to the basic strict liability counts set forth in the original Master Complaint. To the extent Plaintiffs' additional "factual detail" is not a bald assertion of fact, it is legal conclusion. Such new "factual detail" includes:

> D. [Polyurethane foam] was manufactured, sold, marketed and distributed without any necessary product stewardship.
>
> 1. There was a need for defendant Leggett & Platt to follow "product stewardship" practices in order to insure that hazardous products would not be used in an environment that would be a high risk to the public.
>
> 2. Product stewardship is a widely used practice that follows the use of raw materials, intermediate products and final goods through the design, manufacture, marketing, distribution, use and disposal to insure proper application and use in order to protect the public.
>
> 3. Leggett & Platt had to be satisfied that its foam plastic product was going to be used in a safe application before it sold it.
>
> 4. In order to provide a product that meets the physical and safety needs of the occupancy and manner in which it will be used, it is

> essential that foam producers be fully aware of all of the possible and potential applications of the foam that they produce.

Amended Complaint, ¶ 513. Plaintiffs also make new conclusory allegations intended to address L&P's entitlement to dismissal as a bulk supplier. Again, however, Plaintiffs fail to assert true facts and baldly assert only legal conclusions such as "Defendant's foam in question was not a bulk product as would be protected by § 5 Restatement Torts, 3rd." Amended Complaint, ¶¶ 527, 555.

All such allegations are in no sense factual. Instead, they merely assert, without factual support, the existence of a legal duty or the inapplicability of a legal defense, and are nothing more than bald assertions and legal conclusions. As set forth in L&P's Reply Memorandum in support of its Motion to Dismiss, "product stewardship" is not recognized under Rhode Island law as a basis for a product "defect" – or for any other purpose. L&P is not aware of any jurisdiction where a duty of "product stewardship" has been recognized. Similarly, Plaintiffs cannot avoid the bulk supplier doctrine by simply pleading that it does not apply. Regardless, as also discussed in L&P's briefing in support of its Motion to Dismiss, any alleged defect in L&P's foam was not the proximate cause of Plaintiffs' injuries and, therefore, dismissal is appropriate.

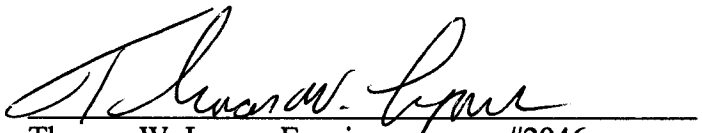
## CONCLUSION

Plaintiffs' Amended Complaint is nothing more than an attempt to avoid, through crafty pleading, the inescapable effect of their own factual allegations. Plaintiffs' theories of recovery against all named defendants are fully consistent with one another and the Amended Complaint contains no alternative theories of recovery or inconsistent factual allegations. Thus, despite Plaintiffs' attempt, the true alleged facts remain unchanged. Numerous and significant

intervening acts occurred between L&P's remote manufacture of bulk polyurethane foam and the alleged injuries. Plaintiffs' factual allegations against all defendants are judicial admissions of those intervening acts. Further, Plaintiffs' new warranty claim and allegations of product defect based on product stewardship do not affect L&P's right to dismissal. The grounds for dismissal in L&P's original Motion to Dismiss and associated briefing, incorporated herein by reference, are fully applicable to the First Amended Master Complaint and warrant dismissal.

WHEREFORE, for the foregoing reasons and for those reasons set forth in the accompanying and incorporated filings, Leggett & Platt, Incorporated and L&P Financial Services Co. respectfully request this Court grant their Motion to Dismiss and dismiss with prejudice all claims made against them in Plaintiffs' First Amended Master Complaint and for such further relief as this Court deems just and proper.

DEFENDANTS
LEGGETT & PLATT INCORPORATED and
L&P FINANCIAL SERVICES CO.
By their attorneys,



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**CERTIFICATION**

I hereby certify that on this 6th day of January, 2005, a copy of the within was sent to all counsel of record by email.

Christie Abrams